(3)

Supreme Court, U.S.
FILED
OCT 10 2009
OFFICE OF THE CLERK

No. 03-408

IN THE

Supreme Court of the United States

LORENA DADDARIO, AS PERSONAL REPRESENTATIVE OF FRANCIS E. DADDARIO,

Petitioner,

v.

THE CAPE COD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

REPLY TO BRIEF IN OPPOSITION

THOMAS OWEN MORIARTY*
V. DOUGLAS ERRICO
DOUGLAS A. TROYER
MARCUS, ERRICO, EMMER & BROOKS, P.C.
45 Braintree Hill Office Park
Braintree, Massachusetts 02184
(781) 843-5000

Counsel for Petitioner

***Counsel of Record**

Dated: October 10, 2003

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

24 pp

TABLE OF CONTENTS

INTRODUCTION 1

I. THE PETITIONER IS NOT BARRED FROM CHALLENGING THE 1997 DECISION OF THE SUPREME JUDICIAL COURT. 1

SUPPLEMENTAL APPENDIX ..... S.A. 1

TABLE OF AUTHORITIES

CASES:

Bates Sand & Gravel Co. v. Commonwealth,
380 Mass. 933, 404 N.E.2d 81 (1980) 2n

Gray v. Handy, 349 Mass. 438,
208 N.E.2d 829 (1965) 2n

Joseph De Vries & Sons v. Commonwealth,
339 Mass 663, 162 N.E.2d 269 (1959) 2n

CODES:

United States Code

28 U.S.C. § 1257(a) 2

INTRODUCTION

Lorena Daddario ("Petitioner") hereby files this reply brief addressing the Respondent's argument, first raised in its Brief in Opposition, that this Honorable Court has previously considered the constitutional issues raised in the Petition for Certiorari and denied review.

I. THE PETITIONER IS NOT BARRED FROM CHALLENGING THE 1997 DECISION OF THE SUPREME JUDICIAL COURT.

The Respondent asserts that this Honorable Court previously considered the constitutional issues raised in the pending Petition for Certiorari and denied review on the merits of same. As discussed below, the argument is without merit.

The Petitioner initially filed a Petition for Certiorari on or about October 8, 1997.

The Respondent filed a Brief in Opposition on or about November 10, 1997 (the "1997 Opposition"). The body of the Opposition is set forth in the Supplemental Appendix appended hereto (hereinafter "S.A.___").

In its 1997 Opposition, the Respondent argued that the Petitioner's claim was not yet ripe for review by this Honorable Court. (S.A. 12).

Specifically, the Respondent asserted that the Petitioner had not exhausted available state law remedies, citing § 17(b) of the special act establishing the Respondent Commission. (S.A. 12).

The Respondent specifically urged this Honorable Court not to "consider an appeal on constitutional grounds before a final decision has been reached on the Petitioner's statutory claim for relief." (S.A. 12-13).[1]

The initial Petition for Certiorari was denied on December 15, 1997.

Thereafter, on or about November 22, 1999, the Land Court dismissed Petitioner's statutory claim for relief under said § 17.

A final judgment eventually entered in the Land Court on September 19, 2000, and was thereafter appealed.

As acknowledged by the Respondent, a final decision for purposes of 28 U.S.C. § 1257(a) was made in this matter on February 27, 2003.

It is, of course, impossible to know if this Honorable Court's order denying Petitioner's 1997 Petition for Certiorari was premised, in any part, upon Respondent's argument that a statutory remedy under § 17 remained available.

The Respondent must also concede the uncertainty.

The Respondent, having vigorously advanced the exhaustion argument in its 1997 Opposition, cannot credibly maintain that this Honorable Court has already necessarily considered the constitutional issues raised by the Petitioner and denied review on the merits of those issues.

---

[1] The impact of Respondent's previous opposition premised upon procedural grounds is significant as, among other factors, the recognition of a separate mining estate in the Commonwealth of Massachusetts provides an opportunity for this Honorable Court to squarely address the denominator issue on the merits. *Joseph De Vries & Sons* v. *Commonwealth*, 339 Mass 663, 162 N.E.2d 269 (1959); *Gray* v. *Handy*, 349 Mass. 438, 208 N.E.2d 829 (1965); *Bates Sand & Gravel Co.* v. *Commonwealth*, 380 Mass. 933, 404 N.E.2d 81 (1980).

To the extent the existence of a statutory claim for relief under § 17 rendered the 1997 Petition premature, the constitutional issues are now clearly presented in the pending Petition for Certiorari.

Respectfully submitted,

THOMAS O. MORIARTY*
V. DOUGLAS ERRICO
DOUGLAS A. TROYER
MARCUS, ERRICO,
EMMER & BROOKS, P.C.
45 Braintree Hill Park
Braintree, MA 02184
(781) 843-5000

Counsel for Petitioner

***Counsel of Record**

SUPPLEMENTAL APPENDIX

No. 97-632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANCIS E. DADDARIO,

Petitioner,

v.

THE CAPE COD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petitioner's statement of "Material Facts" overlooks or misstates several important points. The first and most critical of these is that the Cape Cod Commission ("Commission") denied the Petitioner only the specific mining project proposed to the Commission. The Petitioner does not identify any aspect of the Commission's decision, or the Regional Policy Plan (which guided the Commission's review process), that prohibits the Petitioner from extracting sand and gravel from his property. Despite the Petitioner's urgings, the Supreme Judicial Court did

not accept the Petitioner's argument that the mining configuration he proposed is the only viable means of extracting sand and gravel from his property. *Daddario v. Cape Cod Comm'n*, 425 Mass. 411, 417 (1997) (*see* Petition for Writ of Certiorari ("Pet.") Appendix ("App.") at 9a).

The Petitioner instead argues that the alternative proposals advanced by the Commission's staff during the review process were "facially infeasible," because those proposals called for mining within the 200-foot buffer required by the Falmouth bylaw. (*See* Pet. at 5.) However, as noted by the Supreme Judicial Court in its decision, this buffer requirement can be waived with the assent of the applicant's abutter. (*See Pet.* App. at 3a n.1.) The Petitioner omits the fact that he did not even attempt to obtain this consent from his abutter,[1] thereby undermining any arguments he makes about the feasibility of the Commission's proposals.

The Petitioner claims that his estimate of the value of his land for sand and gravel use was "unchallenged." (Pet. at 6.) Not even the trial judge adopted the landowner's evidence as to value. The Commission's evidence, from a professional geologist and a real estate appraiser, indicated that (a) in the absence of any geological borings to establish the quantity and quality of the reserve, the economic feasibility of mining was speculative, (b) a prudent investor would not pay for unproven reserves, and (c) the highest and best use of the property was residential. The trial judge made no findings as to (a)

[1] The property abutting this portion of the Petitioner's property is also a sand and gravel pit. Quite logically, the Commission's staff concluded that the buffer requirement made little sense where adjoining properties would both involve sand and gravel mining, and left it to the Petitioner to obtain the consent of his abutter to waive the buffer requirement. The Petitioner, having previously sued this abutter to block a special permit for mining sand and gravel, was apparently unwilling to request that waiver.

the value of the property for mining, or (b) specific "before" and "after" values.

The Petitioner asserts incorrectly that the Supreme Judicial Court failed to consider his argument that "he owned a separate and distinct mining estate recognized for takings purposes by state law." (Pet. at 6-7.) The Supreme Judicial Court specifically considered and rejected that position, stating that the taking analysis must consider "the property as a whole." (Pet. App. at 8a.) Significantly, the Supreme Judicial Court relied on this Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 1043, 130-31 (1978), to support rejection of the Petitioner's argument on this issue. As the Petitioner holds fee simple title to his property, the facts of this case raise no compelling reason why this Court should review the established precedent of *Penn Central.*

Finally, the Petitioner fails to mention the current status of this case. in the trial court. Following the remand by the Supreme Judicial Court, the Petitioner requested the trial court to conduct further fact-finding on several issues relating to his taking claim, including the value of his property before and after the Commission's decision. In light of this request, the trial court instructed the parties to brief the issues before the trial court as a result of the remand. In response, the Commission has argued that the sole remaining issue is the Petitioner's statutory appeal challenging the validity of the Commission's decision under its organic act, a claim left unaddressed by the trial court. The Petitioner, however, argues in his brief to the trial court that the Supreme Judicial Court's decision adjudicated at most only his "categorical" taking claim, leaving him free to submit additional evidence of a partial taking under the "ad hoc" factors enumerated in *Penn Central,* 438 U.S. at 124. A copy of the Petitioner's brief to the trial court is attached in the appendix hereto.

REASONS FOR DENYING THE WRIT

I. The Massachusetts Supreme Judicial Court's ruling that the Petitioner's "taking" claim was without factual or legal basis follows this Court's prior holdings.

There is simply no merit to the Petitioner's claim that a taking has occurred, and hence there is no reason for this Court to grant his petition. The Commission's denial of a single application to mine sand and gravel did not effect any of the types of takings under this Court's prior decisions. This is evident from the Supreme Judicial Court's ruling that the trial court's decision lacked sufficient findings to support the Petitioner's claim.

The governmental action here cannot be characterized as a "categorical" taking. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The Petitioner does not claim a physical intrusion upon his property, nor a required dedication of land for public use. *Cf. Dolan v. Tigard*, 512 U.S. 374, 388-89, 394-95 (1994) (dedication of public easements for floodplain greenway and pedestrian/ bicycle pathway); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-39 (1987) (grant of easement for public access to private beach); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-39 (1982) (cable TV box installation on private apartment building).

Nor is this an instance where government regulation has deprived the property owner of "all economically beneficial or productive use of land," amounting to a *per se* categorical taking. *Cf. Lucas*, 505 U.S. at 1015 (barrier beach statute preventing any construction on landowner's property The Supreme Judicial Court found that (a) in denying the Petitioner's specific proposal to mine sand and gravel from thirty-two acres, the Commission neither prohibited mining nor precluded less extensive

mining, and (b) the property had substantial value for other uses, including residential development (allowed as-of-right under Falmouth's zoning).[2] (Pet. App. at 9a.) Even the trial judge acknowledged that the property "may still have substantial value for other development." (Pet. App. at 24a.)

Thus, the Petitioner is not a landowner who "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle[.]" *Lucas,* 505 U.S. at 1019 (emphasis in original). The Petitioner nonetheless attempts to recast his claim as a categorical taking by arguing that, regardless of the remaining value of the property as a whole he has been deprived of all economic value of his "mining estate," which he proposes as the property, interest "denominator" against which he would measure the loss of value. The Petitioner contends that his case furnishes this Court with an opportunity to resolve what he perceives to be conflicts and inconsistencies in the decisions of Circuit Courts, state courts, and this Court itself as to the definition of the, property interests at stake in takings cases. (Pet. at 8-11.) Neither contention has merit.

First, the Petitioner's characterization of his property interest as a separate "mineral estate" ignores the true nature of his title. The Petitioner owns the entire fee simple title to his land (acquired in 1964, thirty years before he applied for a special permit for sand and gravel mining). This case does not involve an attempt to exercise mineral rights acquired separately from the underlying title; there simply is not, and never was, a separate "mineral estate."[3] As both the trial court and the Supreme

---

[2] Such development might not be subject to review by the Commission, which reviews only development activity that exceeds specified thresholds. (*See* Pet. App. at 15a-16a.)

[3] The Petitioner's fee simple absolute comprehends subsurface, surface, air, and water rights, and any other beneficial interest appurtenant to the land.

Judicial Court perceived, what the Petitioner describes as his "mineral estate" is simply his desire to use the property in a particular manner, and to a particular extent, when many other options are, available to him.[4]

Second, by considering the value of the property as a whole when evaluating the Petitioner's takings claim, the Supreme Judicial Court followed this Court's prior holdings. In *Penn Central,* 438 U.S. at 130-31, this Court rejected the argument that the airspace above Grand Central Terminal should be considered as a separate and discrete property interest:

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.

In later decisions, this Court has reiterated that property rights (whether real, personal, or intangible) are to be viewed "as a whole" when analyzing regulatory taking claims. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 643-645 (1993) (no taking found where pension-plan liability imposed on withdrawing

---

[4] Furthermore, in order to review the State's decision on the Petitioner's claim, based upon the supposed existence of a separate mineral estate, this Court would necessarily have to determine the extent to which the property law of Massachusetts recognizes and protects mineral rights as a separate property interest, a topic that was not addressed by the Supreme Judicial Court.

employer is 46% of net worth); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497-8 (1987) (coal required to be left in place not defined as separate segment of property for taking analysis); *Andrus v. Allard,* 444 U.S. 51, 65-66 (1979) (where owner possesses full "bundle" of property rights, destruction of one "strand" not a taking, because aggregate must be viewed in entirety); *see also Villas of Lake Jackson, Ltd. v. Leon County,* 121 F.3d 610, 614 (11th Cir. 1997) (regulatory deprivation of single use of real property must be considered in light of remaining use of property as a whole); *cf. Loretto,* 458 U.S. at 435 (permanent physical occupation is most serious invasion of property interests, because government takes not a single strand, but a "slice of every strand" from bundle of property rights).

The Petitioner seeks support for his claim in the discussion of the "denominator" problem in *Lucas,* 505 U.S. at 1016-17, n.7. Although Footnote 7 raises the possibility of separable property interests, it does not reject the *Penn Central* formulation; it merely suggests that the selection of a denominator might depend on "how the owner's reasonable expectations have been shaped by the State's law of property." In view of the fall array of property interests inhering in the Petitioner's fee simple absolute and the availability of valuable alternative development possibilities, the question raised in *Lucas's* footnote 7 finds as little application here as it did in *Lucas.*

Seeking case support, the Petitioner points to two Circuit Court decisions that he asserts recognize the existence of a separate mineral estate. He asks this Court to adopt and apply his interpretation of those cases, thereby reversing the Supreme Judicial Court's "inconsistent" decision. The Respondent respectfully suggests (a) that the value of the non-mineral estate in those cases was so insubstantial as to negate any comparison to Petitioner's land, and (b) that if this Court had been inclined to review those two decisions, it would have allowed writs of

certiorari, a step that it declined to take. *See Florida Rock Indus. v. United States,* 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied,* 513 U.S. 1109 (1995); *Whitney Benefits, Inc. v. United States,* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied,* 502 U.S. 952 (1991).

The Petitioner's "mining estate" argument is undercut by a factual flaw as well. The Supreme Judicial Court expressly concluded that the Petitioner has not lost the ability to mine sand and gravel from his land as a result of the Commission's decision. (Pet. App. at 9a) ("This denial did not preclude less extensive sand and gravel operations."). Only a single, particular plan of excavation was rejected. Nothing in the Regional Policy Plan prohibits sand and gravel mining. The Petitioner is free to seek a permit for a differently configured mine. There is neither a factual nor a legal basis for a claim of a categorical taking, regardless of the denominator.

Because the Commission did not effect a categorical taking by denying all economically beneficial or productive use of the Petitioner's land, the Supreme Judicial Court considered whether government regulation nonetheless so affected the use of the land as to amount to a taking. That court applied the factors identified in *Penn Central:* "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the government action." (Pet. App. at 7a) (*quoting Penn Central,* 438 U.S. at 124). The court recognized that the analysis of regulatory taking claims is fact dependent, involving "essentially ad hoc, factual inquiries." (Pet. App. at 8a) (*quoting Penn Central,* 438 U.S. at 124). Looking primarily at the economic impact of the regulation, the Supreme Judicial Court concluded that the record did not support the trial judge's finding of a taking, because the property retained "substantial value." The Commission's rejection of the Petitioner's particular plan did not foreclose other sand and gravel

operations; the Commission's staff displayed a willingness to allow less extensive operations, and indeed, proposed alternative plans (one that the Petitioner declined to consider would have allowed sand and gravel extraction on twenty-five acres, in comparison with the thirty-two acres desired by the Petitioner). (Pet. App. at 9a.) Furthermore, evidence at trial supported the Supreme Judicial Court's finding that the property had substantial value for other uses allowed of right under municipal zoning, including residential development.[5] Although the trial judge made no finding on the property's value before and after the Commission's rejection of the Petitioner's proposal, the Supreme Judicial Court concluded that the property retained substantial value for uses other than sand and gravel mining, and that the record did not support the trial judge's ruling that a regulatory taking had occurred. *Id.*

The Supreme Judicial Court did not address the remaining "prongs" of the *Penn Central* test, but if the court had done so, the results would have reinforced its conclusion. The Commission's decision did not unreasonably interfere with the Petitioner's "distinct investment-backed expectations." The Petitioner asserts that he acquired the property in 1964 for the primary purpose of mining (Pet. at 4), but leaves unexplained the thirty-year delay before he sought a permit to carry out that activity. Assuming that the Petitioner also hoped to benefit from appreciation in land values, that expectation has been amply fulfilled. He purchased the property for about $45,000, and shortly thereafter recouped his initial investment by selling a small portion of the property for that same price. The property's current value,

---

[5] The Commission's appraisal expert testified that the property was worth $550,000 to $600,000 if devoted to residential use. The Petitioner's expert testified that the property would be worth $465,000 even if limited to use as conservation land. As of 1996, the property's assessed value for taxation was $474,600.

even if the land is not used at all for sand and gravel mining, is ten to thirteen times the Petitioner's initial investment.[6] See *supra* at n.5. The Commission's decision does not prevent the Petitioner from profiting from his ownership and obtaining a reasonable return on his investment. *See Penn Central*, 438 U.S. at 136; *see also Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) *(Florida Rock II)* (taking analysis should consider impact of regulation on owner's opportunity to recoup investment).

Furthermore, the Petitioner should have expected, when he purchased the land, that sand and gravel mining would be subject to government regulation. Although the Commission did not exist in 1964, the type of land-use regulation at issue here is hardly novel. Massachusetts has long authorized municipal zoning as well as general town by-laws regulating sand and gravel mining. See Mass. G.L. c. 40, § 21, cl. (17) (1996); *Butler v. East Bridgewater,* 330 Mass. 33, 36-37 (1953) (upholding municipal bylaw regulating sand, gravel, soil, and loam removal); *see also Goldblatt v. Hempstead,* 369 U.S. 590, 592-96 (1962) (town by-law barring earth excavation not a taking). The Commission's review of developments of regional impact to ensure their conformance to the county-enacted Regional Policy Plan is comparable to forms of municipal land-use regulation which predated the Petitioner's property acquisition.

Analysis of the third *Penn Central* factor, "the character of the government action," also supports the conclusion that no regulatory taking has occurred. The government activity here is not comparable to the examples offered in *Penn Central,* in which

---

[6] After he purchased the property but before the Petitioner applied for the sand and gravel mining permit, he had modest expectations for the value of the property. In 1989, he sought and obtained an abatement of the property's assessed value. The valuation was reduced from $770,000 to $304,000, well below the 1996 assessed value and the current value estimates discussed *supra* at n.5.

government agencies undertook periodic physical intrusions, including overflights, gun firings, and floodings, that effectively resulted in the property being "taken" for public purposes, *Penn Central,* 438 U.S. at 124, 128.

The Commission's denial of the Petitioner's mining proposal cannot be characterized as a regulatory taking, when that decision is measured against each of the possible categories of takings that this Court has established. A landowner does not prove a taking simply by showing that he has filed a single unsuccessful application to exploit a property interest that he previously believed to be available for development. *Penn Central,* 438 U.S. at 130. The Supreme Judicial Court correctly concluded that the Petitioner's constitutional rights had not been violated. The Petitioner's taking claim is without merit, and his petition for a writ of certiorari should be denied.[7]

---

[7] This Court recently declined to review another Supreme Judicial Court decision in which that court rejected a taking claim after subjecting it to the *Penn Central* factor analysis. *See Leonard v. Brimfield,* 423 Mass. 152, *cert. denied,* ___ U.S. ___, 117 S. Ct. 582 (1996) (upholding special permit that limited construction in a flood plain zone, effectively limiting construction to six of sixteen acres owned).

II. The Petitioner's taking claim is not ripe, and consideration of the claim by this Court would be premature and unnecessary, because the Petitioner, having neither exhausted his state-law remedies nor sought approval of alternative designs, has not established the degree to which uses of his property have been restricted by government regulation.

As the Commission argues *supra,* this Court should deny the Petitioner's petition for a writ of certiorari because it finds no support in this Court's prior decisions on regulatory takings. Even if this Court were to find that the Petitioner's claim had substantive merit and raised significant unresolved constitutional issues, this Court should still deny the petition, because the claim is not yet ripe for this Court's review. There are several reasons why consideration of the claim now would be premature.

(a) The Petitioner has not exhausted the state-law remedies available to him for relief from the Commission's decision. Section 17(b) of the special act establishing the Commission provides a right of judicial review to any party aggrieved by a commission decision on a development of regional impact. (Pet. App. at 6a.) The Petitioner's complaint raises both a statutory § 17 challenge to the Commission's decision and a constitutional taking claim. The trial judge never decided the § 17 appeal, relying instead on his taking analysis to overturn the Commission's decision. The Supreme Judicial Court rejected the taking claim (for lack of ripeness as well as lack of substantive merit), but did not address the § 17 claim, and instead remanded the case for further proceedings. Therefore, the Petitioner retains his statutory appeal, notwithstanding the Supreme Judicial Court's adjudication of his taking claim, and could still prevail on non-constitutional grounds. This Court need not consider an appeal on

constitutional grounds before a final decision has been reached on the Petitioner's statutory claim for relief. *See Williamson Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 187-88 (1985) (claim not ripe where landowner failed to seek variances after proposed plat rejected); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981) (claim not ripe where property owners failed to request variances or waivers from requirements of surface mining act).

(b) Even if the Petitioner loses his statutory challenge to the Commission's decision, the Commission's rejection of one mining proposal still leaves open the possibility that it would approve a differently configured mining plan. There is more than a hypothetical possibility that the Petitioner's property retains substantial value for the very use that he proposes. As the Supreme Judicial Court noted:

> "[T]he commission's staff proposed a plan which would have permitted sand and gravel extraction on twenty-five acres, but the plaintiff declined to consider this alternative or modify his proposal. While not conclusive, the staff's plan demonstrated a willingness to permit less extensive mining proposals."

(Pet. App. at 9a.) It is therefore premature for the Petitioner to claim a "categorical taking of his mining estate" (Pet. at 8) and to assert that his claim provides an opportunity for this Court to address the "denominator" question discussed in *Lucas*, 505 U.S. at 1016 n.7. Because the Petitioner's property may still retain substantial value for both sand and gravel extraction and residential development, his categorical taking claim is neither ripe nor valid,

regardless of whether the affected property is the "mining estate" alone or the property as a whole.[8]

(c) Assuming, *arguendo,* that the Commission would not approve any sand and gravel mining operation (or would only approve one that was, by some measure, economically unfeasible), the record is insufficient to establish either the "pre-regulation" value of the property for sand and gravel mining, or the "post-regulation" remaining value of the property for other uses. The trial judge did not find these values, and the Petitioner did not object to the lack of these findings or cross-appeal to the Supreme Judicial Court. The Commission has not been presented with alternative development plans for the site for uses other than sand and gravel extraction,[9] and so it cannot be determined what other uses would be allowed[10] or what values might flow from those uses. As this Court has stated:

---

[8] *See MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 351-53 & n.8, n.9 (1986) (claim unripe, because rejection of subdivision plan left open possibility that less intensive development would be permitted); *Good v. United States,* 1997 WL 528955, at *19 (Fed.Cl. Aug. 22, 1997) (ripeness doctrine requires good faith effort by developers to satisfy permitting agency after initial denial, reflecting reality that land development often involves process of negotiation); *Southview Assoc., Ltd. v. Bongartz,* 980 F.2d 84, 98 (2d Cir. 1992) (claim not ripe where agency's rejection of subdivision proposal did not preclude submission of another plan for less intensive development located in less critical areas of property, and where agency's decision indicated receptivity to a revised proposal). *Cf., Suitum v. Tahoe Regional Planning Agency,* ___ U.S. ___, 117 S. Ct. 1659, 1662-63, 1667 (1997) (claim ripe where agency had determined that landowner's property could not be developed or used for any productive purpose).

[9] The Petitioner's "futility" argument deserves short shrift for this very reason. It was the Petitioner, rather than the Commission, who refused even to consider alternative mining plans.

[10] As noted *supra* at n.2, not all types or degrees of development would require Commission approval, because the

> "[I]t follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a *final and authoritative determination of the type and intensity of development legally permitted on the subject property.* A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986) (emphasis added); *see also Williamson*, 473 U.S. at 191 (*Penn Central* factors cannot be evaluated until agency "has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question"). This "essential prerequisite" is missing in this case. Consequently this Court should conclude that it is "unable to address the merits" of the Petitioner's claim, *MacDonald*, 477 U.S. at 348, and should deny his petition.[11]

(d) Although the Petitioner contends that his taking claim is ripe for this Court's review, he adopted a contrary position in the brief he submitted to the trial judge following the Supreme Judicial Court's remand. In that brief, he argues that the case was

---

Commission reviews only those projects that exceed the thresholds for developments of regional impact.

[11] The Supreme Judicial Court considered both the ripeness issue and the substantive merits of the Petitioner's takings claim, and vacated the trial court's judgment on both grounds; either ground would have been dispositive. The Supreme Judicial Court was able to *reject* the merits of the claim, because there was "ample" evidence that the property had substantial value for uses other than sand and gravel removal. (Pet. App. at 9a n.5.) It would not have been able to *uphold* the claim on its merits, because the record did not support a finding of no remaining productive use. (*Id.* at 7a, 9a-10a.) The burden is on the property owner to show that he has been denied all economically beneficial use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.6 (1992).

remanded for the trial judge to determine (i) whether the Commission would approve less extensive sand and gravel operations, and (ii) what the "after-imposition" (i.e., post-regulation) value of the property would be. The Petitioner contends in that brief that the judge has sufficient evidence before him to determine that the Commission would not approve other mining proposals, and that the taking claim is therefore ripe. The Petitioner admits, however, that "[a]bsent such determination it is impossible to decide, if a taking has occurred." Likewise, he admits that the trial judge "made no determination of the 'after imposition' value of the [Petitioner's] property," and that "this determination is necessary to address the taking claim."[12] The Petitioner requested that the trial judge allow additional briefs and take additional evidence on the value of the property. In short, the Petitioner proclaims to the trial court on remand that the Supreme Judicial Court did not reach a final determination on either the ripeness or substantive takings issues and remanded the case for further findings on each issue.

If, as the Petitioner contends in the remand proceedings, the Supreme Judicial Court has not made a final determination on the issues presented in the petition for certiorari, then this Court is bound by statute to deny the petition, because there has not been a final judgment or decree by the State's highest court respecting the federal question. 28 U.S.C. § 1257(a). As a matter of logic as well as law, this Court should not review the Petitioner's Federal claims while he is still pursuing a decision from the trial judge on those same claims and where any further decisions by the judge will be subject to

---

[12] See relevant pages from "Plaintiff's Brief Re: Scope of Remand" (Sept. 5, 1997), appended hereto. The Respondent argued to the trial judge that the Supreme Judicial Court did make a "final adjudication" of the taking claim, and that the case was remanded solely to address the statutory claim for judicial review of the Commission's decision.

additional appellate review by State courts. *See Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (important purpose of "final judgment" requirement is to prevent interference with state proceedings when underlying dispute may be otherwise resolved).[13]

(e) The Petitioner contends that the Supreme Judicial Court erred in treating ripeness as a jurisdictional issue not subject to concession or waiver at the trial level. This argument merits only a brief answer. The Commission denies that it "waived" that issue; it did in fact address the ripeness issue in its post-trial memorandum. Furthermore, this Court has spoken conclusively on its right to address the ripeness issue *sua sponte*. *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18 (1993) (ripeness question may be raised on the Court's own motion, and the Court is not bound by the wishes of the parties); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974) (Court not bound by parties' concessions in deciding ripeness, because issue involves exercise of judicial restraint from unnecessarily deciding constitutional issues); *see also Suitum v. Tahoe Regional Planning Agency*, ___ U.S. ___, 117 S. Ct. 1659, 1669 (1997) (Court addresses "fitness to review" ripeness requirement, raised by defendant for first time); *Bateman v. City of West Bountiful*, 89 F.3d 704, 706 (10th Cir. 1996) (ripeness is issue of subject matter jurisdiction). This Court should respect the right of State courts to adhere to the same policy. Indeed, while the existence of ripeness in a taking claim may be a Federal question because of the constitutional implications, the Petitioner has not shown that a constitutional right is put at risk by procedural rules governing when the ripeness issue may be raised, and by whom.

---

[13] This case does not fall within any of the categories of cases where finality may be found despite the existence of further State proceedings. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975).

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

CAPE COD COMMISSION
By Its Counsel

ARNOLD P. MESSING
Counsel of Record
ERIC W. WODLINGER
H. HAMILTON HACKNEY, III
JOHN J. GOLDROSEN
CHOATE, HALL & STEWART
Exchange Place
53 State Street
Boston, Massachusetts
02109 (617) 248-5000

Dated: November 10, 1997